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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-807

ROBERT C. AGRON,

Petitioner,

vs.

ILLINOIS BELL TELEPHONE COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHROP-WARREN PRINTING COMPANY, CHICAGO

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ILLINOIS BELL TELEPHONE COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Robert C. Agron prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 22, 1971.

OPINIONS BELOW.

The opinion of the Court of Appeals (App. 1a) is not yet reported. The opinions of the District Court (App. 18a and 23a) are reported at 319 F. Supp. 418 and 325 F. Supp. 487 (N. D. Ill., 1970).

JURISDICTION.

The Court of Appeals entered judgment on September 22, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Are state and local taxes charged to telephone subscribers and separately stated on telephone bills includable in the federal telephone tax as "amounts paid for . . . communication services" (26 U. S. C. § 4251)?

2. If refunds are due, they are owed to 3,000,000 subscribers, the bulk of whose claims are too small to warrant individual action, but together total more than $10,000,000. Does a federal court have jurisdiction to entertain a class refund suit on their behalf or is such suit barred by sovereign immunity?

STATUTORY PROVISIONS INVOLVED.

The applicable statutory material is set forth at App. 27a.

STATEMENT OF THE CASE.

After his individual and class refund claims were denied by the Internal Revenue Service ("IRS"), petitioner brought this statutory action under 28 USC § 1346(a)(1) individually (Count I) and on behalf of three million subscribers of Illinois Bell Telephone Company ("IBT") who are situated similarly to him (Count II) to recover from the United States refunds exceeding $10,000,000 for communication services taxes collected illegally since Oc-

tober, 1965. The federal communication services tax, Internal Revenue Code ("IRC"), 26 USC §§ 4251-4254, currently authorizes a 10% telephone tax on "amounts paid for * * * communication services * * *." IRC § 4251(a). For some years the State of Illinois and various municipalities have collected taxes based on telephone service charges or "gross receipts". (Ill. Rev. Stat. (1969) Ch. 120, § 467.1; Ch. 24, § 8-11-2). IBT pays these taxes but is authorized to and does collect from subscribers the amount of such taxes together with the cost of collection (Ill. Rev. Stat. (1969) Ch. 111⅔, §§ 36(a)(b)). These taxes are stated separately on telephone bills in a column designated "Due to State and Local Taxes". The Government and IBT have been collecting the federal telephone tax not only on telephone services but also upon these state and local taxes.

On cross-motions for summary judgment, the district court held that the state and local taxes were not amounts paid for communication services and that it was illegal to collect the federal tax on top of the state and local taxes. 319 F. Supp. 418; App. 18a. While granting petitioner judgment for the amount of his individual claim, $23.98, the court held that there was no federal jurisdiction over a class action to recover tax refunds on the theory that sovereign immunity required a refund claim for each of the 3,000,000 subscribers. 325 F. Supp. 487; App. 23a.*

* The district court also held that in an action against the United States, IBT could not be joined as a defendant in Counts II and III and that Count III, which stated a derivative claim on behalf of IBT for its subscribers under IRC § 6415(a), could not be maintained. App. 23a. Petitioner does not argue these issues here, but reserves them should the Court issue a writ of certiorari not otherwise limited. We merely note the underlying facts as to why IBT's joinder was necessary and proper under Federal Rule 19. As of about 1969 the total refund due exceeded $10,000,000. The amount being overcollected from IBT subscribers as a class currently exceeds $3,000,000 a year. The Government has no records to determine the amount of refunds due to the subscribers as a class or individually. The total refund due to the class as a whole may be determined from IBT records. IBT

The Court of Appeals reversed (App. 1a). Although it held unsound the Government's principal argument that the separately stated state and local taxes are "amounts paid for communication services" because they are included in the "sum of all charges" in the telephone bills (App. 14a, n. 14), the court gave effect to that very contention by concluding that they are "part of the price IBT demands for its services" (App. 12a, 15a). Because of its disposition of the merits, the court did not reach the procedural-jurisdictional issues concerning the class and derivative actions and joinder of parties.

REASONS FOR GRANTING THE WRIT.

1. *The Court of Appeals erroneously held that state and local taxes on telephone charges, even where separately billed as taxes, are "amounts paid for communication services."*

The decision below places in jeopardy an important principle of federal tax law administration affecting all taxes passed on to consumers and conflicts with decisions of this Court, other Courts of Appeals, including the Seventh Circuit, and the Court of Claims, and is contrary to Congressional intent.

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records also show the amount overpaid by individual subscribers at least for a significant period. The refund due each subscriber may also be computed from telephone bills rendered to subscribers by IBT, but few subscribers will have retained their complete bills for the period in question and cannot know how much to claim. Administratively a refund will be most feasible if carried out through IBT which is the collecting agency for the United States. IBT may be the proper party to receive the refund from the United States on behalf of its subscribers. Counts II and III pray for judgment against the United States for a refund for the total amount overcollected from all subscribers from October, 1965, to date and for an accounting by IBT to determine the amount of the refund. See Rappaport Affidavit, Jt. App. 81-4.

The Court of Appeals stated that the Government was wrong in its principal argument that the state and local taxes are amounts paid for communication services because they are computed in the "sum of all charges" included in the telephone bill. App. 14a, n. 14. Yet the court gave effect to this very contention. This fundamental inconsistency is inexplicable but the court's reliance upon *Lash's Products* v. *United States*, 278 U. S. 175 (1929) is clear error: (1) in conflict with *Lash's Products* it failed to give effect to the established rule that the price paid for goods does not include taxes that are separately stated; and (2) it misapplied *Lash's Products* and confused the issue of what is the "price paid" with what are the "goods" or "services" subject to tax, an issue not before the Court in *Lash's Products*.

A. The Court below misconstrued and misapplied *Lash's Products*. In that case a federal tax was imposed on manufacturers to the extent of 10% of the price for which soft drinks were sold. No state or local taxes were involved. This Court held that for purposes of computing the tax, the price included the federal tax unless it was separately stated. That case concerned what was the price paid for goods which were concededly soft drinks subject to tax. The court below failed to discern that the issue here is not merely the method of computing the price paid for communication services but whether the items in question —state and local taxes—are in fact and law charges for "communication services." Only by first determining that they are could the court reach the question whether they are includable as amounts paid for communication services if stated separately. But the court below never really considered whether state and local taxes were charges for communication services. Instead, it merely concluded, based on *Lash's Products*, that since IBT charged subscribers for such taxes, they must be amounts paid for

communication services because they are "a part of the price IBT demands for its services." (App. 15a.) The court thus followed the Government's "sum of all charges" argument, which is based on IRC §4254, while stating that it recognized this contention was fallacious (App. 14a, note 14). The court below confused the issue of what is the price paid for "communication services" with the issue of whether state and local taxes are "communication services" subject to the federal tax.

The decision is not only inherently inconsistent but squarely at odds with the communication services tax statute, regulations and rulings which make clear that the tax applies only to charges for telephone services and that whether an item included in the bill is subject to federal tax must be independently examined to ascertain whether it is for "communication services." The court's conclusion that Congress intended that "the amount charged by a telephone company should not be broken down into its component parts for purposes of computing the tax" (App. 14a, n. 14), is plainly erroneous. The whole thrust of the statute and the Government's own regulations and rulings is to the contrary. The bill must be and is broken down to determine whether the item charged by IBT is in fact for communication services. Thus, charges included in the bill for "yellow page" directories are not subject to tax because they are really for advertising. Rev. Ruling 58-299, 1958-1 C. B. 436 and Cf. Rev. Ruling 68-92, 1968-1 C. B. 488. In a whole variety of rulings under this tax the IRS has considered the nature of the services for which charges are made to determine whether such charges are for communication services or for something else. These rulings reveal that the amounts paid must be for some kind of *telephonic* service, equipment or facilities.[1] These rulings

1. See, e.g., Rev. Ruling 56-248, 1956-1 C. B. 518; Rev. Ruling 56-390, 1956-2 C. B. 837; Rev. Ruling 68-93, 1968-1 C. B. 488; and Rev. Ruling 56-391, 1956-2 C. B. 837-8.

Items included in the bill must also be excluded when expressly exempted by the statute. IRC § 4253(g).

are consistent with the statute itself which limits communication services to amounts paid for "telephone service" (IRC § 4251(a)). See also IRC §§ 4252(a)(b) and 4254 (a)(1).

The regulations confirm what is clear on the face of the statute as to the meaning of "amounts paid for communication services." Thus Regulations § 49.4251-1 (26 C. F. R. § 49.4251-1; C. B. 1963-2, 550) provides in part:

> "(a) In general. Section 4251 imposes a tax on *amounts paid for general telephone service;* toll telephone service; telegraph service; teletypewriter exchange service; wire mileage service; and wire and equipment service. * * * (emphasis is supplied throughout this Petition unless otherwise stated).

See also §§ 49.4251-2(b), 49.4252-1(a)(b), 49.4252-2(a)(b); 49.4252-4(a) and 49.4254-1(a).

From the face of the statute, the regulations and rulings, it plainly appears that the amount paid for communication services embraces only charges made by IBT for its *telephone services* and does not embrace state or local taxes measured by the charge for the communication services, as the district court correctly held (319 F. Supp. at 421; App. 22a).

Even if the statute, regulations and rulings did not clearly exclude the local taxes as charges for communication services, it certainly cannot be said that they are clearly includable. For this reason, too, the court below has run afoul of decisions of this Court expressing the universal and fundamental principle that in the interpretation of tax statutes any ambiguity must be construed strictly against the government. *Gould* v. *Gould,* 245 U. S. 151, 153 (1917) ("In case of doubt [tax statutes] are construed most strongly against the government, and in favor of the citizen.").

B. The federal tax consequences of separately stating federal, state or local taxes has had application in a variety of important tax contexts over the years and, as this case illustrates, down to the present time. It has long been engrained in federal tax statutes and regulations. In *Lash's Products,* this Court held, in accordance with the Revenue Service's own regulations, that where the price of goods sold included the federal tax in a composite or single price and did not state separately the amount of the federal tax on "soft drinks", the price of the goods sold upon which the federal tax was based included the federal tax itself. When the "soft drinks" tax was held inapplicable to sweet cider, the purchaser, under contracts which had separately stated the federal tax, was permitted to recover the taxes he paid to his vendor. Judge Cardozo, then speaking for the New York Court of Appeals, stated: "This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. . . . This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. . . . ." *Wayne County Produce Co.* v. *Duffy-Mott Co.*, 244 N. Y. 351, 155 N. E. 669 (1927).

Following these decisions, the Courts of Appeals and the Court of Claims have consistently held that the distinction in stating or not stating separately taxes, as well as other items, is one with a considerable difference to federal taxpayers. See, e.g., cases concerning refunds of processing taxes declared invalid: *Golding Bros. Co. v. Dumaine,* 93 F. 2d 162, 164 (C. A. 1, 1937); *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366 (C. A. 10, 1939); and *Ismert-Hincke Milling Company* v. *United States,* 90 Ct. Cl. 27 (1940). Indeed, a leading case concerning such refunds and giving effect to the failure to set forth taxes as a separate item was a Seventh Circuit decision, *Continental Baking Co.* v. *Suckow Milling Co.*, 101 F. 2d 337 at 338 (CA 7,

1939). See also *Consolidated Flour Mills* v. *PH Orth Co.*, 114 F. 2d 898, 903 (C. A. 7, 1940).[2] Similarly, the Court of Claims has held that the federal excise tax on automobiles did not apply to actual freight charges when stated separately, *Star Motor Co.* v. *United States*, 41 F. 2d 901 (Ct. Cl. 1930).

In relying on the oft-quoted statement in *Lash's Products* that the "price is the total sum paid for the goods", the court below (App. 11a-12a, 14a 15a) patently failed to take into account the distinction recognized in *Lash's Products*, and followed in the other cases cited above, that the price paid for goods does not include taxes which are stated separately. Instead, the court below held that since it found that under state law the state and local taxes were imposed on IBT, not the subscribers, it was immaterial that the taxes were stated separately because they were part of IBT's price. The court said (App. 12a):

> "That the cost of taxes *imposed* on manufacturers and retailers is added into the price at which goods are sold, even if such taxes are itemized and specifically identified, simply increases the price the consumer must pay to receive the goods or services."

Assuming, *arguendo*, that the state and local taxes are imposed on IBT and *only* the burden on subscribers, that fact has never before been of significance when the taxes

2. The consequences to taxpayers of separately stating taxes also has importance in relation to state law. In *Tax Review Board* v. *Esso Standard Div.*, 424 Pa. 355, 227 A. 2d 657 (1967) the court held that the separately stated federal gasoline tax would not be included in calculating a local sales or "gross receipts" tax. The same result was reached in *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N. W. 908 (1937) on the theory that the state sales tax and federal gasoline tax attached simultaneously at the moment of sale. In the case at bar the state and local "messages" taxes and the communication services tax are generated simultaneously at the moment telephone service is purchased. See also *Crerar Clinch Coal Co.* v. *Board of Education*, 13 Ill. App. 2d 208, 141 N. E. 2d 393 (1957) (exempt taxpayer could not deduct sales tax from purchase price where tax was not separately stated).

were separately stated. In *Lash's Products* the tax was imposed on the manufacturer but, under this Court's opinion and the commissioner's own regulations, it would not have been included in the price of the goods had it been separately stated. In the processing tax cases cited above the tax was on the processer, but the buyers were entitled to refunds since the taxes would not be deemed part of the price paid if separately stated.

Congress also has recognized repeatedly, as has the IRS itself until its 1969 ruling in this case, that different federal tax consequences flow from the fact that taxes are separately stated, regardless of where the legal incidence of those taxes lie.[3]

(i) Thus, where Congress has considered specifically the question whether state and local sales taxes are part of the federal tax base, as it did in the retailers' excise taxes, former § 4051, IRC, it excluded such state and local sales taxes from the federal retailer excise tax base. Section 4051, which was repealed by the Excise Tax Reduction Act of 1965, provided that the tax base was to exclude, "if stated as a separate charge, the amount of any retail sales tax imposed by any State * * * or political subdivision * * *, *whether the liability for such tax is imposed on the vendor or the vendee.*"

(ii) The IRS reached the same result where the statute was silent and it had to pass on the question under the manufacturers' excise tax law. IRC § 4216(b) provides rules for determining a constructive sales price in the case of manufacturers' excise taxes, where those taxes are

3. The notion that no federal tax significance attaches to the fact that state and local taxes are separately stated *if* the taxes are imposed on the seller or person rendering the service had not the slightest foundation in federal law until the IRS fashioned its special 1969 tax ruling for this case long after this litigation had begun in 1967. Rev. Ruling 69-151, 1969-1 C. B. 288 (Jt. App. 27). While not expressly citing the 1969 ruling, the Court of Appeals clearly adopted it. See App. 12a.

based upon manufacturers' prices but the particular articles are sold at retail. Neither that provision nor the applicable regulations make specific reference to the treatment of local taxes. The IRS concluded (Rev. Rul. 63-37, 1963-1 C. B. 242) that the policy of equating the tax with what would be paid if the articles were sold to wholesale distributors, requires that a local tax which is equivalent to a sales tax (in the particular case involved the tax was referred to as a "gross income tax" or "privilege" tax) should not be considered part of the price upon which the manufacturers' tax is based.

(iii) In Revenue Ruling 63-8, 1963-1 C. B. 254, the IRS reached the same result regarding the cabaret tax (§ 4231(6)) and held that a state privilege tax imposed on certain retailing and service business activities could, if passed on to patrons, be excluded in determining the amount upon which the federal cabaret tax is to be computed. As in the case of the manufacturers' excise tax, the statute contained no explicit instructions regarding the treatment of state or local taxes. Although § 4231(6) was also repealed in 1965, the reasoning is especially relevant here since the cabaret tax provisions appeared in the same chapter as the communication services tax.

Based on the foregoing three reasons, as well as his discussions "with the national office of the Internal Revenue Service," Lawrence N. Woodworth, Chief of Staff of the Joint Committee on Internal Revenue Taxation, wrote Illinois Congressman Sidney Yates on January 16, 1967 that with respect to the state and local taxes here involved:

> "any state or local tax which is in substance a retail sales tax (regardless of the terminology used by the State or local government in describing that tax), *if the amount of the tax is separately stated on the bill, will be excluded from the amount upon which the communications tax will be based.*"[4]

4. The Government recognized in the court below that the taxes here are parallel to sales taxes.

A copy of this lettter is attached to the refund claims filed herein. (Supp. App. Ex. 4 to Ex. 1 and Ex. 3 to Ex. 3.)

The IRC also provides that retail occupation and gasoline excise taxes may be deducted from income taxes by consumers if separately stated and paid by them even though the taxes are imposed on their vendors. See IRC § 164(a)(b)(c). This is clear evidence that while state and local excise taxes may be imposed on vendors for state law purposes, federal law has long considered such taxes as imposed on the consumer, so long as they are separately stated and passed on to him. The Code recognizes, as did the Illinois Supreme Court with respect to the local taxes here involved, *East St. Louis* v. *Union Electric Co.*, 37 Ill. 2d 532, 229 N. E. 2d 522, *cert. denied*, 390 U. S. 948 (1967), as did the district court, 319 F. Supp. 421, App. 21a, 22a, indeed, as did the Court of Appeals, App. 6a, 7a, the economic reality that a separately stated tax falls on the consumer and that the seller or utility is merely a collecting conduit. The City of Chicago expressly recognized in the preamble to its amended tax ordinance that the taxes were being imposed in substance on the consumers, not the utility. See App. 29a.

This Court should grant its writ of *certiorari* to resolve finally this important issue of statutory construction, which bears not only on the communication services tax but also in the context of other federal (and state) tax laws where a distinction has been drawn with repect to taxes which are separately stated; to resolve conflicts with decisions of this Court and other federal courts; and to correct a decision which is in the teeth of the telephone tax statute, regulations and pre-1969 rulings. The decision below directly affects not only the 3,000,000 subscribers of IBT but also other telephone subscribers in the State of Illinois who obtain telephone service from non-Bell com-

panies.[5] The IBT subscribers alone have already been overtaxed by more than $10,000,000 between 1965 and 1969, and, unless this Court reviews the decision below, will continue to be overtaxed at the rate of more than $3,000,000 annually.

2. *Does a district court have jurisdiction of a class action under Federal Rule 23 to recover federal excise taxes?*

This is an important federal question which has not been, but should be, decided by this Court. The decision below is incompatible with holdings of this Court and other courts.

The basic issue here is one of federal jurisdiction—does Rule 23 of the Federal Rules of Civil Procedure apply to tax refund actions, or are such suits barred by the doctrine of sovereign immunity. The district court held that the Government has consented to suit only where each individual taxpayer has filed a claim for refund setting forth the amount due him and that a class refund claim will not satisfy jurisdictional requirements. 325 F. Supp. at 488; App. 23a-24a. This is an important issue which has given difficulty to lower federal courts but which has not, to our knowledge, been considered specifically by this Court.

There is no real dispute that if the district court has jurisdiction to apply Rule 23 to tax refund suits, this is a classic case for application of the rule.[6]

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5. The record does not disclose and petitioner does not know whether there are other state and local taxes in states other than Illinois which present the identical issue as here.

6. The Government conceded below that the prerequisites of Rule 23(a) are met. It is equally clear that the facts of this case bring it squarely within clauses (A) and (B) of Rule 23(b)(1). The Reporter to the Advisory Committee states that clause (A) "takes in cases where the party is obliged by law to treat the members of the class alike" and cites as illustrations "a utility acting toward customers" and "a government imposing a tax." Kaplan, note 8, *infra*, 81 Harv. L. Rev. 356, 388 (1967). Clause

Unless a class action is maintained millions of taxpayers whose individual claims are too small to warrant the filing of individual refund claims and refund suits will have no practical means of recovering their overpayments and the Government will retain an illegal multi-million dollar windfall. The courts frequently have held that in similar circumstances a class action is maintainable in order to open the door of justice to small claimants, to bring about efficiency in judicial administration and reduce the time and expense of the litigants and the courts in reaching a uniform decision on the merits affecting a large number of persons.[7] This tax refund action is unquestionably within the letter and purpose of Federal Rule 23 according to all leading commentators on the Federal Rules.[8]

(B) plainly applies since an adverse adjudication of plaintiff's claim "would as a practical matter be dispositive of the interests of the other members * * * or substantially impair or impede their ability to protect their interests." Indeed, the Court of Appeals disposed of the *Cleveland* case merely by disposing of the merits of the *Agron* case. Rule 23(b)(3) also applies. It can scarcely be doubted that one common question predominates over all others, namely, whether it is lawful to collect the tax by adding the state and local taxes to the federal tax base. This ultimate issue of governmental liability is the same as to petitioner and each member of the class. There is no sound reason why all subscribers and the Government should not receive the benefit or detriment of the final judgment on the merits.

7. See, e.g., *Escott* v. *Barchris Const. Corp.*, 340 F. 2d 731 at 733 (C. A. 2 1965), *cert.* denied sub nom., *Drexel & Co.* v. *Hall*, 382 U. S. 816; *Hohmann* v. *Packard Instr. Co.*, 399 F. 2d 711, 715 (C. A. 7, 1968); *Eisen* v. *Carlisle and Jacquelin*, 391 F. 2d 555, 560, 566-7 (C. A. 2, 1968); *Esplin* v. *Hirschi*, 402 F. 2d 94, 101 (C. A. 10, 1968) *cert.* denied, 394 U. S. 928 (1969); and *Green* v. *Wolf Corp.*, 406 F. 2d 291, 297, 300, 301 (C. A. 2, 1968), *cert.* denied, 395 U. S. 977 (1969).

8. See the Advisory Committee's note to Rule 23, 39 F. R. D. 69, 100-104; Kalven and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi. L. Rev. 684, 685, 692-3, 694-5, 698, 699, 714-717 (1941), a leading article relied on by the Committee; and an article by the Reporter to the Committee written in an unofficial capacity, Kaplan, *Continuing Work of the Civil Commit-*

The Government's alternative to a class action is for each of 3,000,000 telephone subscribers to file individual refund claims and follow the administrative refund-litigation route taken by petitioner. But everyone knows that several million subscribers with claims of $25.00 or less are simply not going to take the path of administrative strangulation. If they did, the Government would be faced with the impossible task of processing and determining the validity and accuracy of several million small claims, a result which the Government would hardly desire and of course does not anticipate. Moreover, only those subscribers who have retained their complete monthly telephone bills for many years can determine the amount of their individual claim. In sum, the Government's "alternative" to a class action would insure the death knell of refunds to a large class of small claimants, is without support in law and is an ignoble effort to avoid payment of millions of dollars of tax refunds to millions of small taxpayers.

Nevertheless, the district court accepted the Government's contention that it did not have jurisdiction under Count II to maintain a class action. The court said that the claim filed by petitioner on behalf of the class was "unsatisfactory" and that each subscriber must file his own claim setting forth the amount due and exhaust his administrative remedy. 325 F. Supp. at 488, App. 23a-24a. In effect, the court applied the doctrine of sovereign immunity. The court reached this result by relying upon: IRC § 7422(a) which states that no tax refund suit shall be maintained "until a claim for refund . . . has been . . . filed", the regulations with respect thereto, 26 C. F. R. § 301.6402-2; and various lower court cases, including

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tee: 1966 Amendments of the Federal Rules of Civil Procedure, 81 Harv. L. Rev. 356, 387-8, 390, 391 (1967). See also, 3B Moore's Fed. Prac. (2d Ed. 1969) ¶ 23.95, p. 23-1851, which states that a class action will lie against the United States for tax refunds.

Herrington v. *United States*, 416 F. 2d 1029 (C. A. 10, 1969); *Harkins* v. *United States*, 66-2 U. S. T. C. ¶ 9543 (E. D. Okla. 1966), aff'd on other grounds, 375 F. 2d 239 (C. A. 10, 1967); *McConnell* v. *United States* 293 F. Supp. 605 (E. D. Tenn. 1969); and *Lipsett* v. *United States* 37 F. R. D. 549 (S. D. N. Y. 1965), aff'd 359 F. 2d 956 (C. A. 2, 1966). While these cases are in certain respects distinguishable[9] or support petitioner, in other respects they appear to support the decision below. For the reasons stated below the decision of the district court was wrong, is in conflict with other decisions of this Court and lower federal courts, and there is need for the exercise of this Court's supervisory powers now.[10]

A. The district court's application of sovereign immunity to limit its jurisdiction conflicts with decisions of this Court and other courts. The Government has consented to be sued for tax refunds. Section 1346(a)(1) of the Judicial Code, 28 USC § 1346(a)(1), upon which this action is based, confers original jurisdiction in the district courts over "any civil action against the United States for the recovery of any . . . tax. . . ." When consent is given "it is liberally construed", and no "sensible reason can be imagined why" the remedy should be paralyzed. *United States* v. *Yellow Cab Co.*, 340 U. S. 541, 554-5 (1951).[11] In

9. For example, they involved income tax refunds which may present additional issues not relevant here.

10. Petitioner's efforts to secure class relief commenced in November, 1967 when his first suit was filed. If this Court should decide only the merits and remand the class action issue to the Court of Appeals, it will be at least six years before the latter issue is finally adjudicated. If it should be decided that a class refund action does not lie, the delay will work an injustice to taxpayer-subscribers because even those whose claims are large enough to warrant individual action will have their claims cut down by the three-year statute of limitations on tax refunds.

11. See also 3A Moore's Fed. Prac. (2d Ed. 1969) ¶ 20.07[3], p. 2864.

Yellow Cab this Court observed that Congress made the Federal Rules of Civil Procedure applicable under the Tort Claims Act, 28 USC § 1346(b), and held that the Government could be sued as a third-party defendant, notwithstanding a claim of sovereign immunity. See especially 340 U. S. 553, n. 9 and S. Rep. No. 1559, 80th Cong., 2d Sess. 11-12. Since § 1346(a)(1) with respect to tax refund actions and § 1346(b) with respect to Tort Claim actions were enacted at the same time and since both provide for federal jurisdiction over "any civil action" it is clear that Congress considered the Federal Rules were applicable to tax refund as well as to Tort Claim actions. Accordingly, even if Rule 23 could be construed as an extension of the jurisdiction of the court—which it is not—this authority was plainly granted by Congress in 28 U. S. C. § 1346(a)(1).[12]

There is nothing in IRC § 7422(a) which expressly bars a class refund claim. Nor is there anything in Regulation § 301.6402-2, which expressly prohibits a claim on behalf of a class. Petitioner did file a refund claim on behalf of the class. The claim was denied. Hence, federal jurisdiction exists.[13]

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12. This conclusion is supported also by the fact that Congress has denied injunctive and declaratory relief in tax matters. See 26 U. S. C. § 7421(a) and 28 U. S. C. § 2201. If Congress had intended for class relief under Rule 23 to be inapplicable to tax refund actions it would have said so.

In *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 641-644 (D. Kan. 1968) the court held that a class action could be maintained against the United States under the Tort Claims Act and the Tucker Act (28 USC § 1346(a)(2)) even though the Government argued that it is not liable to suit by a class without its consent.

13. The class claim here meets the purpose and requirement of the statute and regulation. Supp. App. Ex. 3. It fully apprises the Government of the nature of the claim and avoids litigating "every claim" asserting identical grounds for relief. *Herrington* v. *United States*, 416 F. 2d 1029, 1032 (C. A. 10, 1969). The fact that the precise amount of refund due each subscriber or

B. The district court also erred in concluding that each member of petitioner's class must file a refund claim and exhaust his administrative remedy. The exhaustion doctrine is inapplicable where, as here, there is involved only an issue of law and there is nothing of an administrative nature to be done. *Houghton* v. *Shafer*, 392 U. S. 639, 640 (1968); *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 148 (CA 5, 1936), *cert. denied*, 298 U. S. 688; *Koepke* v. *Fontecchio*, 177 F. 2d 125, 128 (CA 9, 1949); *Wolff* v. *Selective Service Board*, 372 F. 2d 817, 825 (CA 2, 1967); *Hammond* v. *Lenfest*, 398 F. 2d 705, 713, 714 (CA 2, 1968); *Foley* v. *Hershey*, 409 F. 2d 827 (CA 7, 1969).

Even if applicable, the exhaustion doctrine has been satisfied by petitioner. His individual and class claims have exhausted the administrative remedy on behalf of himself and all other subscribers, and thereby vested the district court with jurisdiction on behalf of all. In *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (C. A. 5, 1968), the court held that a class action could be maintained under § 706(c), of the Civil Rights Act of 1964, 42 U. S. C. § 2000-5(c), even though the members of the class had not filed a charge with the Equal Employment Opportunity Commission, *a condition precedent to seeking judicial relief under § 706(e).* The court said (p. 498): "* * * once an aggrieved

to all subscribers is not stated in the claim is of no consequence. The regulations and statute do not require it. *National Forge & Ord. Co.* v. *United States*, 151 F. Supp. 937, 941 (Ct. Cl. 1957); *Burrell* v. *Fahs*, 232 F. 2d 163, 166 (CA 5, 1966); *Electric Storage Battery Co.* v. *McCaughn*, 54 F. 2d 814 (E. D. Pa. 1931). What the refund claim and this action seek is the total refund due to all subscribers as a class. This amount can be ascertained from IBT records so that the total refund paid by the United States will not exceed the amount overcollected. Thereafter, IBT, as the Government's collecting and disbursing agent, may make refunds to subscribers in such manner that will do substantial if not precise justice to them. See Rappaport Affidavit, Jt. App. 81-87. "In the administration of Internal Revenue Laws, we are concerned with substance and not form." *Kales* v. *United States*, 115 F. 2d 497, 500 (CA 6, 1940), aff'd 314 U. S. 186 (1941).

person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated * * *." See also, *Metcalf* v. *Swank*, 444 F. 2d 1353, at 1358 (C. A. 7, 1971).

C. The district court overlooked its inherent equity jurisdiction to grant class relief. Federal Rule 23 stands on a different footing than other procedural rules. As this Court said in *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356, 366 (1921) [Reaffirmed in *Snyder* v. *Harris*, 394 U. S. 332, 340, 355, n. 23 (1969)]:

> "It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. 1 Street, Fed. Eq. Pr. § 549."

On this basis this Court held that despite the jurisdictional diversity requirement of § 238 of the Judicial Code (now 28 U. S. C. § 1332) if requisite diversity existed between the original parties, federal jurisdiction is not ousted merely because later intervenors or members of the class represented by the original parties are citizens of the same state as an adverse party.

The jurisdictional restraint, if any, of IRC § 7422(a) is no more applicable to class actions than is the jurisdictional restraint of § 1332 of the Judicial Code (28 U. S. C. § 1332) imposing the diversity requirement. The petitioner, having satisfied the jurisdictional requirements by filing a refund claim, can maintain a class action for subscribers who have not made such a claim, in the same manner as a plaintiff who has satisfied the diversity of citizenship requirement can bring a class action for persons similarly situated who cannot satisfy the diversity requirements. Since the court unquestionably had jurisdiction under 28 U. S. C. § 1346(a)(1) to grant relief to petitioner, it also had jurisdiction to grant relief to the class.

Conclusion.

For the reasons hereinabove stated, petitioner respectfully requests that this Court issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit, reverse the judgment of that court and grant such other relief as may be appropriate.

Respectfully submitted,

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